In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 537.

THE SECOND FEDERAL SAVINGS AND LOAN ASSOCIATION OF CLEVELAND,

Appellant,

vs.

STANLEY J. BOWERS,
Tax Commissioner of Ohio,

Appellee.

APPEAL FROM THE SUPREME COURT OF OHIO.

REPLY BRIEF IN SUPPORT OF JURISDICTION.

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Appellee's Motion to Dismiss is based only on the claim that the appeal does not present a substantial Federal question. It is not claimed that the Federal questions sought to be reviewed were not timely or properly raised or passed upon or that the judgment rests on an adequate non-federal basis. Appellee states in argument (p. 3):

> "Thus, the single question properly raised is whether the amended Ohio statutes are improper on the basis of this Court's opinion in *Society for Savings,* 349 U. S., 143, 75 S. Ct. 607, 99 L. Ed. 950."

(p. 4):

> "The appellant has made no claim that the assessment against it is contrary to Ohio law or to the Ohio Constitution."

Thus, it is conceded by Appellee that this case involves the same questions as were presented in the cases of *Society for Savings* and *First Federal.*

The Ohio court in its opinion disregarded the holding of this Court in *Society for Savings* and *First Federal*, 349 U. S. 143, 150; 75 S. Ct. 607, 611, in substance that the asserted property interests of depositors in the surplus of the institution are without any real or theoretical value. The state court seemed to read the opinion of this Court as holding the former law of Ohio unconstitutional only because it failed to make express provision for recovery of the tax from the depositors after payment by the institution. To read it as an acknowledgment that the State may tax to the depositors supposed ownership interests which are without value to them is not justified.

We submit that the state court was not justified in considering some, and ignoring other, questions involved. Once having determined that the amended statutes provided for a method of recovery of the tax paid by the institution from the depositors, it could not ignore the questions whether the tax must be borne by the institution in order to avoid a flight of deposits to stock institutions; whether the tax exceeds the value, if any, of the assumed ownership interests of depositors and therefore deprives them of property without due process of law; whether it does not result in discrimination against depositors in mutual institutions as compared with those in institutions having capital stock; whether the statutes do not impose discriminatory double or triple taxation upon the depositors; whether the provision for recoupment or reimbursement of the tax is illusory and unavailable as a practical matter and results in the real incidence of tax upon Appellant itself, depriving it of property without due process and denying its depositors and itself the equal protection of the laws contrary to the Fourteenth Amendment as well as infringing the fiscal powers of the Federal government; and all of the other questions involved.

These are all matters going to the merits rather than to the substantiality of the questions raised. The questions are still as substantial in the case at bar as they were in *Society for Savings* and *First Federal*. They are questions which the Ohio Department of Taxation should be glad to have definitely and finally considered and determined by this Court, since they likewise concern many other financial institutions in the state and involve large sums of money in each tax year. They affect the fiscal operation of the federal government.

The Board of Tax Appeals, in its entry, not only recognized that the constitutional question was "interesting," but that if Appellant's contention is correct, then the statutes providing for the assessment of the tax are unconstitutional. This question has been at all times present and asserted since the inception of the administrative proceedings before the Tax Commissioner wherein Appellant applied for review and redetermination of the 1957 assessment.

Respectfully submitted,

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